MONEY STOLEN BY A TRUSTEE FROM ONE TRUST AND USED FOR ANOTHER.

IF it be true of language in general that it is an imperfect contrivance for the expression of human thought, this is especially true of the maxims, technical terms, and stock phrases employed to express legal conceptions. They furnish many short cuts and save a deal of time. They tend on the whole to simplify the processes of thought. But they are usually silent as to the reasons for their being and seldom admit their own limitations. Terms such as those with which we are about to deal, like "subrogation," "tracing of trust property," and "purchaser for value," are all short cuts. They are familiar and invite us to use them. The mind feels at home in their company. That they are apt, however, to lead us astray is well illustrated by the recent case of Newell *v.* Hadley.[1]

The case may be stated briefly as follows:

A man named Berry was trustee of two estates, the Newell Estate and the Pickett Estate. He had an inactive co-trustee of each estate. As trustee of the Pickett Estate, he had collected income with which he ought to have paid taxes and other bills but had stolen it. Wishing to conceal this theft and also to get more money which he could use dishonestly, he sold stock belonging to the Newell Estate and applied more than $6500 of the proceeds to the payment of the bills of the Pickett Estate. About three months later he resigned as trustee of the Pickett Estate and settled his accounts, charging himself with everything for which he was properly chargeable and being allowed for the money stolen from the Newell Estate and paid to the creditors of the Pickett Estate. His co-trustee and beneficiaries of the Pickett Estate knew nothing about his wrongdoings. About three years later he was discharged as trustee of the Newell Estate and his defalcations were discovered. Nearly six years after Berry had settled his final account with the Pickett Estate the bill in this case was filed by Newell, as trustee of the Newell Estate, and his

[1] 206 Mass. 335, 92 N. E. 507 (1910).

beneficiaries against Hadley, who had succeeded Berry as a trustee of the Pickett Estate, his co-trustee, and their beneficiaries in order to recover the money which Berry had stolen from the plaintiffs. It was held that the defendants must pay the plaintiffs so much of the stolen money as Berry had used in paying debts of the Pickett Estate.

When we perceive that as between itself and Berry, the Pickett Estate had received no more than its due, we cannot help being surprised by the decision. If as a result of Berry's wrongdoings the defendants had got something to which they were not entitled and had got it at the plaintiffs' expense the equity would have been plain. But here were two estates represented by the same dishonest trustee. Neither trust, so far as Berry's co-trustee and beneficiaries were concerned, was any more responsible for Berry's wrongful conduct than the other. One trust was a heavy loser. The other had come out whole, but no more than whole. It is difficult to understand why equity should not have let the loss lie where it had fallen instead of transferring a portion of it to the innocent beneficiaries of the other trust.

Without going outside the opinion itself [2] we find that if a trustee of two estates, N. and P., steals from Estate P. money which he ought to have paid to the beneficiaries of that estate by way of income, and afterwards steals money from the other estate and uses it to pay the beneficiaries of Estate P., Estate N. has no remedy. It has no remedy although its money can be traced directly into the hands of the beneficiaries who have received the full benefit. On the other hand, if the trustee steals from Estate P. money which he ought to have paid to creditors of that estate, and afterwards steals from Estate N. money which he uses to pay the creditors of Estate P. and later gets credit for such payments in a settlement of his accounts, Estate N. can trace the money into the benefit which Estate P. received through the payment of its debts and recover the value of that benefit.

The mere statement of these apparently irreconcilable propositions raises a strong suspicion in our minds that principles of equity, the operation of which depends so much upon chance and produces results so capricious, are not principles of equity at all.

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[2] 206 Mass. 349, 92 N. E. 513.

Moreover, the consequences of the decision are really alarming. Henceforth the beneficiaries of a trust may take every precaution — make their trustee render accounts, go over the securities and examine the vouchers — but they can never be sure that he has not all the time been stealing from the estate, and paying the bills (which his accounts and vouchers show he has paid) with money stolen from other people. Years afterwards they may be mulcted for heavy damages under Newell *v.* Hadley. Or take a simpler case: I give my agent money to pay a debt; he steals the money and then to conceal his theft steals money from a stranger, pays my debt with it and brings me the receipted bill. Five years afterwards the stranger brings suit against me. Under Newell *v.* Hadley I should have to pay the bill again with interest.

In a case of this sort there are obviously two things to be considered: (1) whether the plaintiff has an equity to support his claim; and (2) if the plaintiff has an equity, whether the defendant has any equity on his side strong enough to meet and overcome the plaintiff's equity.

In discussing Newell *v.* Hadley we shall first deal with the plaintiffs' equity and show what it was.

The opinion of the court (Knowlton, C. J., alone dissenting) was written by Loring, J. After referring briefly to a number of cases, Loring, J., thus states the ground on which the plaintiffs' equity rested:

> "There are suggestions in some of these cases that the doctrine on which they rest is that in such cases the lender [here the Newell Estate] is subrogated to the rights of the creditors. In others it is suggested that in these cases the true owner of the money is allowed to trace his property into the benefit enuring to the defendant, on the principle on which an owner can in equity trace his property into any form into which it has been wrongfully converted. And in others, that this is an independent ground of equitable relief. It is not necessary to determine whether these principles are not in their essence the same or what is the most accurate way of stating the principle on which these cases rest, for we are of opinion that they were well decided, and that the principle on which they rest is well founded and should be adopted by us." [3]

In order to reach any result in a satisfactory way it was clearly necessary for the court to determine whether the plaintiffs ought

[3] 206 Mass. 342, 92 N. E. 510.

to have been subrogated to the rights of the creditors, or whether the plaintiffs could in any true sense trace their property. And if the relief was to rest on an independent ground it was necessary to determine what that ground was. We discover no attempt whatever to define the real substantive equity of the plaintiffs. If, to be sure, they had a right to recover, it made little difference whether the court worked out their remedy by saying that they could be subrogated to the rights of the creditors or by saying that they could trace their money into the benefit which the Pickett Estate had received. But no clear distinction was made by the court between an equitable doctrine in respect to the way in which a substantive right may be worked out, like the doctrine of subrogation, and an equitable doctrine which determines whether a plaintiff has any substantive right which ought to be worked out.

So far as the plaintiffs' right was concerned the court apparently did not regard the tracing theory as a mere fiction, but adopted it to some extent as the ground of its decision. The court also seems to have had in mind the fact that the defendants had been benefited at the plaintiffs' expense, but did not inquire whether this fact taken by itself would support the decision. Strangely enough we can put into a pot, say one pint of "benefit at the plaintiff's expense," a cupful of "tracing trust property," flavor the mess with a pinch of "subrogation" and a teaspoonful of something out of a bottle which has no label on it, and can thus cook up a recognizable and substantial equity.

The word "subrogation" discloses nothing as to the nature of the plaintiff's equity. There is of course always some substantive equity which induces the court to resort to subrogation, but the equity in one case may be quite different from what it is in another case. Take two familiar illustrations. A man insures his house against loss by fire and the house is burned through the negligence of a railroad company. For one and the same loss he has two remedies, — one against the insurance company and the other against the railroad. If the insurance company pays the loss equity will subrogate it to the assured's claim against the railroad, and allow the insurance company to prosecute the claim in the assured's name but for its own benefit. This is a case of actual subrogation. The insurance company's equity rests on the fact that it has paid the loss. Between it and the assured the latter has

no right to be paid twice, and if anything can be collected from the railroad to reduce the actual loss the insurance company is entitled to it. In case the assured has collected both his insurance and his damages there can be no actual subrogation, but the insurance company can be subrogated in equity and recover from the assured what he has collected from the railroad.[4] Again, if two men stand to one another in the relation of principal and surety in respect to a debt and the surety pays the debt, he may be subrogated in equity to the rights of the creditor against the principal. The debt has really been discharged, but equity will deal with the matter as if the debt still existed and subrogate the surety to the creditor's rights. The equity rests on the duty which the principal owed to the surety to pay the debt. We do not find substantive equities like these in the case at bar. Assuming, however, that the plaintiffs had a good equity, it would have made no difference in the result whether the court had said simply that the defendants must pay the value of the benefit, or that the plaintiffs should be subrogated to the rights of the creditors.

It would seem unnecessary to argue that there could be no tracing of trust property in a case like Newell *v.* Hadley unless it had been mentioned by the court as a possible ground for equitable relief.

When trust property is traced it is always a part of the trust *res*, or something into which the trust property has been converted and with which it can be identified, that the court follows. The defendant has in his hands property to which the trust has attached. The equitable owner recovers it because the mere transfer of the legal title does not affect his equitable ownership. In the ordinary case where the defendant has paid value the equity clearly has nothing whatever to do with any benefit received by the defendant at the plaintiff's expense. Having bought and paid for the property the defendant has received no benefit. Yet if he took with notice of the trust he is charged with it. On the other hand, if the defendant be an innocent donee although there is nothing to affect his conscience with the trust, a court of

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[4] *Cf.* Hart *v.* Western R. Co., 13 Met. (Mass.) 99, 104 *et seq.* (1847). The law in Massachusetts has been changed by statute. Rev. Laws (1902), c. 111, § 270. See Lyons *v.* Boston & Lowell R. Co., 181 Mass. 551, 64 N. E. 404 (1902); New England Box Co. *v.* N. Y. C. & H. R. R. Co., 210 Mass. 465, 97 N. E. 140 (1912).

equity allows the equitable owner to recover. The plaintiff's equitable ownership constitutes a sufficient equity. There is no equity on the donee's side. The trust is attached to the property and the plaintiff's equity is worked out accordingly.

The defendants in Newell *v.* Hadley had got no part of the trust *res*. The money was gone. There it was in the hands of the creditors, who were so-called purchasers for value and could hold it against all the world. If Berry had bought a house with it you could have identified the house with the money. But the benefit which he bought for the Pickett Estate was intangible and could not be identified with any part of the property belonging to that trust. The beneficiaries of the Pickett Estate were perhaps better off by $6500, but it was impossible to identify this general enrichment with any particular part of the trust estate.

If, then, the plaintiffs had an equity it could not rest at all on the tracing of the trust property, but must rest altogether either on the fact that the defendants had been benefited at the plaintiffs' expense, or on some "independent ground of equitable relief" which can be discovered in the cases to which Loring, J., referred. We do discover in those cases an "independent ground of equitable relief" which it is not difficult to state or describe, but we are wholly unable to see how it applies to Newell *v.* Hadley.

The leading case relied on for the establishment of the principle adopted by the court is Bannatyne *v.* MacIver.[5] In that case the Lords Justices simply applied a doctrine which had often been applied where the officers of a corporation had borrowed without authority on behalf of the corporation to a case where an agent borrowed without authority on behalf of his principals who were partners. In the corporation cases it had been held that, although the lender had no action at law, he could recover in equity so much of the money as had actually been used for the benefit of the corporation.[6] In Bannatyne *v.* MacIver an agent named Hudson had made an unauthorized borrowing on behalf of his principals. The plaintiffs were the lenders, the defendants were the principals. The borrowing would not have been necessary unless Hudson had drawn for his own use funds which his principals had provided and which as between Hudson and his principals he should have applied

[5] [1906] 1 K. B. 103.

[6] *In re* Cork & Youghal Ry., L. R. 4 Ch. 748 (1869).

to the payment of bills which he in fact paid with the borrowed money. The borrowing though unauthorized was made ostensibly on behalf of the principals, the money was deposited to their account, and was used to a considerable extent for the payment of their bills.

In all such cases there is obviously a double equity. Not only is there the equity arising from the fact that if the agent's authority is denied, then the defendant's bills have been paid with money which belonged in equity to the plaintiff, and the defendant has received a benefit at the plaintiff's expense, but there is another distinct equity in the nature of an estoppel. To the extent to which the agent has actually used the borrowed money for the defendant's benefit, it is plainly inequitable that the defendant should be permitted to deny the agent's authority. In effect, the court says to the defendant: "While you enjoy the benefit of the agent's borrowing on your behalf, you cannot in equity deny your obligation to pay back the money. This estoppel, however, goes no further than to make you responsible for so much of the borrowed money as has actually been used for your benefit."

If Hudson had not tried to borrow on the defendants' behalf, but, in order to conceal his wrongful overdrafts, had stolen the money from the plaintiffs and used it to pay the defendants' bills, then we should have had a case like Newell *v.* Hadley. The defendants would have been benefited at the expense of the plaintiffs. The plaintiffs would have had this ground for equitable relief. But there would not have been a trace of the other equity. The plaintiffs could not have said that they had been induced to part with their money by any promise, which the agent had undertaken to make for his principals, to pay the money back. No sort of estoppel could have been invoked.

We do not say that this estoppel was present in all the cases to which Loring, J., referred. If a wife borrows money, there is no undertaking on her part that her husband will pay the money back. Yet if she actually uses it to buy necessaries, the lender may perhaps recover the money from the husband in equity.[7] The lender's money has been used to buy things which the husband was bound to supply. The husband has been benefited at the lend-

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[7] Harris *v.* Lee, 1 P. Wms. 482 (1718).

er's expense. This, however, is the only ground for equitable relief. It is plain that there can be no estoppel, unless the wife has undertaken to borrow as her husband's agent, when a court of equity could refuse to let the husband deny his wife's authority to the extent of the benefit which had actually enured to him through the use she made of the money.

We shall have occasion to refer again to Bannatyne *v.* MacIver. For the present we only want to point out that this element of estoppel was present as a ground for relief in the principal cases relied on by the court, and that in so far as they rested on that ground they were not applicable to the facts in Newell *v.* Hadley.

It is now apparent that there was really no mystery or difficulty in respect to the ground on which the plaintiffs in Newell *v.* Hadley could ask for relief. We accept the conclusion of the court that the money remained the money of the Newell Estate up to the moment when Berry used it to pay the Pickett Estate's bills. At that moment, however, the title to the money was transferred by the payment of it to the creditors. It then ceased to be the Newell Estate's money. By this wrongful use of the money Berry bought for the Pickett trust, for his co-trustee and his *cestuis* a discharge from any further liability in respect of those debts. This benefit was bought with the plaintiffs' money.

We have shown that "subrogation" is not a word to conjure with. We have excluded any notion that the trust property could be traced. We have also excluded any sort of estoppel. Nothing is left except the fact that the defendants received a benefit at the plaintiffs' expense, and we shall assume that this fact taken by itself afforded sufficient ground to support the plaintiffs' equity. If Berry had owed the defendants no duty to pay the bills, had not got credit for their payment in the settlement of his accounts, and the suit had been begun immediately after the payment, the plaintiffs' equity would have been clear enough.

Before we go on to consider the defendants' equities we wish to point out that although Berry had no transaction with the defendants in which he delivered to them the benefit which he had bought for them with the stolen money, and they knew nothing about it, the benefit was none the less actually received at the time when the bills were paid. This is necessarily involved in the decision. The

benefit was received by the defendants or the court could not have ordered them to pay the value of it. It was received at the dates when the bills were paid or the court could not have charged them with interest from those dates.[8]

It may be observed that if the defendants were to be charged in respect of any benefit received by them at the plaintiffs' expense, it was necessary to discriminate between the defendant trustees and the defendant *cestuis*. If the trustees were liable, they and not the *cestuis* should have been ordered to pay the amount due the plaintiffs and their liability should have been limited to the trust estate in their hands. If, on the other hand, the *cestuis* were personally liable, the trustees could not have been liable too, and each *cestui* was not liable for all of the plaintiff's money but only for the part of it which in some form or other he had actually received. The rescript sent down by the full court made no such discrimination, but ordered that a decree be entered directing the defendants generally to pay the amount due with interest.

It would be interesting to determine just where the benefit was when the suit was brought. Assuming that it was originally received by the estate, nevertheless when the suit was brought the estate was no larger or more valuable than it would have been if Berry had not paid the debts. The debts in question were payable out of income. If Berry had not paid them the trustees would have been obliged to pay them out of income which in good faith they had presumably paid over to the *cestuis*. At the time when suit was brought, therefore, the trustees did not have the benefit as part of the trust estate in their possession. The *cestuis* had already received it in the shape of income, and had probably spent it in the innocent belief that it was theirs to spend as they chose. The benefit could not at one and the same time have been both in the *cestuis* and in the trust estate.

Although these questions as to which of the defendants had been benefited, and to what extent, were questions which it was necessary for the court to determine in order to frame a proper decree, the defendants' equity which we are about to consider could have been invoked by all the defendants, no matter whether the benefit had enured to the trust estate, to the trustees, or to the *cestuis*.

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[8] 206 Mass. 354, 92 N. E. 515.

The most obvious equity on the defendants' side was that, in respect of the benefit which Berry had bought for them with the plaintiffs' money, they should have been treated like purchasers for value. The Chief Justice based his dissenting opinion on this ground, and we think that the rest of the court would have agreed with him if the nature of the plaintiffs' equity, the nature of the possible relief, and the reasons why one who receives trust property in payment of a preëxisting debt is often treated like a purchaser for value, had all been made plain.

We think we have made it perfectly clear what the nature of the plaintiffs' equity was. In doing this we have shown incidentally what it was that the plaintiffs were asking the court to take away from the defendants, namely, the benefit which Berry bought for them when he paid the debts and not the money which he used for that purpose. This seems perfectly obvious, but curiously enough it is the point on which the court really split. The Chief Justice makes it clear that he is talking about the benefit as the thing which the defendants could hold as purchasers for value. But the court sometimes talks about the benefit which enured to the defendants and at other times about the defendants' being regarded as purchasers for value of the money itself, in a way which renders the opinion extremely difficult to comprehend.

To show that the court actually entertained the notion that it was the money itself which the defendants might or might not hold as purchasers for value, we need quote only two passages:

"When Berry repaid in part the money stolen from the defendants by paying their debts with the $5522.70 stolen from the plaintiffs, Berry and Berry alone represented the defendants in receiving the $2652.70." [9]

Again, dealing with the possible effect of the accounting which took place between Berry and his co-trustee and beneficiaries after he had spent all the money stolen from the Newell Estate, the court said:

"There was no fund then in existence of which the defendants could become purchasers for value without notice. How that accounting could be held to make the defendants purchasers for value without notice of money which had been paid out three months before has not been explained." [10]

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[9] 206 Mass. 348, 92 N. E. 513.

[10] 206 Mass. 349, 92 N. E. 514.

How it could ever have been supposed that the defendants received the stolen money and might stand as purchasers for value in respect to the money we cannot conceive. The benefit was what they received. It was just as if it had been Berry's duty as trustee to buy bonds for his *cestuis* with the income of the Pickett Estate which he had stolen, and he had used the money of the Newell Estate to discharge this duty, asking the seller to send the bonds to the *cestuis*. In that case, although the plaintiffs' money could have been traced directly into the bonds the *cestuis* could have held the bonds as purchasers for value just as they were allowed to hold the money of the Newell Estate paid to them by way of income.[11] Our contention is that when the defendants had given Berry credit for the payment of the debts they were in equity just as much purchasers for value of the benefit as they would have been of the bonds.

There is another curious thing in the opinion which makes the reasoning difficult to follow. That the defendants' right to be regarded as purchasers for value depended on the fact that, as between them and Berry, Berry owed them a duty to buy for them the benefit which they received, would seem to be obvious. We find, however, that the court dealt with the argument that the defendants were purchasers for value and disposed of it without any clear reference to that fact,[12] and then said:

"The *only other ground* [the italics are ours] on which the defendants could be thought to have a better equity than the plaintiffs arises from the fact that the defendant trust had provided Berry with money to pay the debts paid by him with the money of the plaintiffs." [13]

What this fact could have had to do with any equity of the defendants unless to put them in the position of creditors who had received something from Berry in payment of a preëxisting debt so that they might be treated like purchasers for value it is hard to understand.

Perhaps the court reasoned in some such way as this: "In every case brought to our attention in which the defendant has been treated like a purchaser for value there has been some transaction between him and the trustee in which the legal title to property has

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[11] 206 Mass. 349, 92 N. E. 513.

[12] 206 Mass. 348–351, 92 N. E. 513–514.

[13] 206 Mass. 351, 92 N. E. 514.

been transferred. Without such a transaction you cannot have a purchaser for value. The money of the Newell Estate which Berry used to pay the debts was the only property in respect of which there was any such transaction. If therefore the defendants did not receive the money they cannot be regarded as purchasers for value of anything at all. The purchaser-for-value argument can be thoroughly disposed of by showing that when the money was paid by Berry to the creditors no innocent person representing the defendants received it."

If this was the line of reasoning, we have a good illustration of the danger referred to at the outset of using a familiar term like "purchaser for value" without understanding its meaning as applied to the case in hand.

We realize perfectly well, that, before the accounting which took place later between Berry and the Pickett trust, there was no transaction between Berry and any innocent person representing the trust, no transfer of any legal title, and no innocent person representing the trust even knew that the benefit had been received. We mean to show, however, that when trust property has been taken by a defendant in payment of a preëxisting debt due from the trustee there is nothing in the fact that the defendant has obtained the legal title to the property which makes his position any better, so far as the reason and equity of the purchaser-for-value rule are concerned, than was the position of the defendants in Newell *v.* Hadley who had obtained a benefit which a court of law would not take away from them. We also mean to show that there is nothing in the transaction which usually takes place between the trustee and the innocent defendant to affect the latter's equitable right to keep what he has got, except his knowledge of the payment and his very natural belief that the debt has been discharged. In Newell *v.* Hadley, when Berry's accounts were allowed the defendants all knew that he had paid the bills, and believed that he had thus discharged *pro tanto* his obligation to account for the income of the trust estate.

The term "purchaser for value" has very different meanings in different cases. In the original sense of the term a purchaser for value is one who pays value at the time he purchases. He may purchase negotiable paper or bonds from a man who has no title without notice of his want of title. He may purchase property from

a trustee who has the legal title without notice of the trust. In either case he can hold the property. To take it away from him would make him lose the money he has paid; to make him pay the value of the property would be making him pay twice for the same thing. His equity is manifest.

Subsequently the term "purchaser for value" was applied to a person who does not pay anything at the time he takes the property but receives it in payment of a preëxisting debt. In such a case it is obvious that taking the property away from him immediately after the transaction would inflict no loss, but would put him in exactly the same position that he was in before he received it. His equity is by no means so clear as the equity of a man who gives value in exchange for the property.

It was assumed, however, by all the judges, in Newell *v.* Hadley, to be well settled that a person who receives money or any sort of negotiable instrument without notice and in payment of a preëxisting debt is a purchaser for value, and that the same principle applies whether the preëxisting debt be an ordinary debt or some sort of an equitable obligation.

We have said that the equity of the innocent person who has actually paid value is manifest. It now behooves us to consider why one who has taken the property for a preëxisting debt is treated like a purchaser for value.

If we try to find the reason of the rule, we naturally look for it in the transaction. So much has been said about the transaction between the trustee and an innocent person that we are led to suppose that we shall find in the transaction itself something which gives rise to the equity. Let us then see what the transaction really amounts to.

The transaction between the unfaithful trustee and the innocent purchaser who actually pays value consists of two parts: the trustee transfers the legal title; the purchaser pays for the property. So far, however, as the equity is concerned, the passing of the title counts for nothing. It is, to be sure, a condition precedent, but only in this sense, that unless the purchaser has got the legal title there is no occasion to consider his equitable right to retain the property. If he were an innocent donee or took with notice he would get a good legal title, but a court of equity would take the property away from him. It is his payment

of value which gives rise to his equity. In this way only is the transaction important.

On the other hand, the transaction which takes place between the unfaithful trustee and the man who takes the property for a preëxisting debt is one-sided. The trustee gives his creditor the legal title to the property, the creditor gives nothing. In this case the mere transfer of the legal title counts for no more than it does in the other. The equity depends altogether on the existence of the preëxisting debt. We talk in a loose way about the creditor's giving the trustee a discharge. He really gives nothing. To say that he gives a discharge of the debt means only that he takes the property in payment. It is the law and not the creditor that gives the discharge. And even if the creditor may truly be said to give something, it costs him nothing. So far as the immediate transaction of giving and receiving payment is concerned, the creditor only receives a benefit. The *quid pro quo* was given in an earlier transaction which created the debt.

Inasmuch as the equity or reason for the well-established rule in the ordinary case is not to be found in the passing of the legal title to the property, or in the transaction itself, we have to look for it elsewhere. It is not far to seek. It is easily discovered in the fact that as a practical matter the owner of the equitable title can seldom if ever have his remedy instantly applied, and unless it be instantly applied the court feels no certainty that it can put the defendant back in the same position that he was in before he received the property in satisfaction of his debt. He may very likely have failed to pursue his debtor as he otherwise would have pursued him. The debtor's ability to pay may have become impaired. And a court of equity is not at all willing to run the risk of doing an injury to an innocent person for the benefit of a plaintiff whose trustee has been guilty of a breach of trust. The defendant's change of position, which may or may not be susceptible of proof but yet takes place in almost every case, constitutes a substantial equity and justifies the rule.

We have already shown that the transfer of the legal title has nothing to do with the equity of the defendant's position, but merely creates the condition of things which requires a court of equity to consider whether or not the defendant should be compelled to surrender what he has got. Now this condition of things existed in

Newell *v.* Hadley. The defendants had received the benefit which Berry had bought for them with the plaintiffs' money and had a perfect legal right to retain it. The only question was whether a court of equity should compel them to surrender it, or what is the same thing, pay the value of it, to the plaintiffs.

As to the innocence of the defendants no question was raised. Nor was there any question in respect to the preëxisting debt. Berry owed the defendants a duty to account for the income. This was the duty which he owed in respect to the part of the plaintiffs' money which he paid to his *cestuis* in cash and which they were allowed to hold as purchasers for value. And if it had been Berry's duty to buy certain bonds for his *cestuis*, and he had received income enough to make the purchase but had stolen it, and had then bought the bonds with the plaintiffs' money and had delivered them to the *cestuis*, the same obligation resting on Berry would have made the *cestuis* purchasers for value of the bonds. It will also be observed that although the plaintiffs' money could have been traced directly into the bonds, this circumstance would not have weakened the equity of the *cestuis*. For all purposes, the duty of Berry to account to his beneficiaries for the income was equivalent to the preëxisting debt of the ordinary case.

The defendants being innocent, having got the legal title to the benefit which the court was asked to take away from them, and Berry having bought the benefit for them in payment of a preëxisting debt, nothing further is required to bring the case within the reason of the rule except to show that the defendants received what Berry had bought for them in discharge of the debt. Berry, as we know, asked to be allowed for the payments in his accounts, and the defendants did allow him credit therefor. When the accounting had taken place, it was just as if the defendants had known of the payments when they were made and had given Berry some sort of acquittance at that time. As soon as the accounting had taken place the defendants believed that the debt had been discharged and thereafter governed themselves accordingly. This made the analogy perfect between their case and that of the ordinary purchaser for value who has taken the property for a preëxisting debt. There is more than a perfect analogy. The cases are in every essential particular the same. Every reason of equity and practical expediency which has induced courts to treat the defendant like a purchaser

for value in the ordinary case held good and made it equitable to treat the defendants like purchasers for value in Newell *v.* Hadley.

When the subject has thus been stripped of everything non-essential and merely accidental, so that we can see the real equity of the defendants, this is what we find. We now see why it was that when we were told that the defendants might have kept the money but could not keep the benefit bought for them with the money, we felt that the distinction was too flimsy to be sound, and must be due to some sort of intellectual hocus pocus.

If there be any valid distinction between a case where a trustee wrongfully delivers a chattel to his creditor in payment of a pre-existing debt, and a case where he wrongfully delivers money, a cheque, a note, or other negotiable instrument,[14] then the benefit which Berry bought for the trust with the plaintiffs' money should clearly have been regarded as the equivalent of money. Whenever in an accounting a trustee gets credit for money expended for the benefit of his trust, and money was actually used as he says it was, then it must be that the trust stands in respect of the benefit so received just as if the money itself had been turned over to the *cestuis* instead of to the creditors. This proposition cannot be denied without impairing the negotiable character of money. Take one or two illustrations. Suppose that A. has been acting as B.'s agent in the purchase of goods. A. renders an account in which he charges himself with say one hundred items of money paid to creditors for as many different lots of goods and produces the receipted bills. The account shows a balance still due to B., which A. tenders in cash. B. has a right to assume that the money A. used to pay the bills was either B.'s money in A.'s hands, or A.'s own money. He need not go behind each of the one hundred receipted bills and satisfy himself that the money A. used was not stolen money. He can accept the account and vouchers with the same confidence that he accepts the money tendered him to square the account. Take another illustration suggested by the case in hand. Suppose that Berry's co-trustee had become aware of the fact that although Berry had collected income enough the tax bill had not been

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[14] *Cf.* Goodwin *v.* Mass. Loan & Trust Co., 152 Mass. 189, 199, 25 N. E. 100 (1890); Blanchard *v.* Stevens, 3 Cush. (Mass.) 162 (1849).

paid; that he had gone to Berry and had told him that the taxes must be paid; and that Berry had said, "Yes, I ought to pay them. Come with me to City Hall and see me pay the bill"; and suppose that they had gone together to the collector's office where in his co-trustee's presence Berry had paid the tax bill, using for the purpose the plaintiff's money but keeping his co-trustee in ignorance of that interesting feature of the transaction. The city could have kept the money, because it was money and was taken in good faith and in payment of a preëxisting debt. By the same token the innocent co-trustee would have had a right to keep the benefit which Berry bought for the trust, because he knew that it was bought with money, and accepted this use of the money in satisfaction of Berry's obligation. Money being money, the co-trustee would have had a perfect right to assume that Berry was the owner, to treat him accordingly, and to go his way satisfied that Berry had so far discharged his duty. Yet there would have been no transaction between Berry and his innocent co-trustee in which the money was delivered to the latter. The innocent co-trustee would have been but a spectator of the passing of the money. The transaction between the two trustees would have been in the nature of an accounting, the one doing something he was bound to do, the other accepting the benefit enuring to the trust in satisfaction. No one can doubt the right of the innocent co-trustee to be treated as a purchaser for value in the case supposed, — not of the money itself, because he did not receive the money, but of the benefit bought for him with the money. Yet, being a mere spectator of the transaction between Berry and the city, his knowledge of the payment and acceptance of it in satisfaction of Berry's debt to the trust are the only essential things making him a purchaser for value of the benefit. If, then, the bill be paid without the knowledge of the co-trustee the benefit enures to him just the same. And if he afterwards learns that the bill has been paid with money and gives Berry a discharge on the faith of it, the equity of his position is just as strong as if he had obtained his knowledge by witnessing the payment.

The talk about subrogation suggests still another way of illustrating the point. The title to the money which Berry used to pay the defendants' bill, was in Berry and in his co-trustee, Newell. If in equity the debts were not paid but were kept alive, then Berry

and Newell became the equitable assignees of the debts, holding them in place of the money and in trust for the Newell Estate. If Newell had discovered Berry's misappropriation of the money, it would have been his duty as trustee to enforce payment of the debts and thus recover the money. But so long as Berry kept his secret, there were still persons in the world, namely, his innocent co-trustee and the *cestuis* of the Pickett Estate, in dealing with whom he could use the debts just like money. He could in effect make a tender of the benefit he had bought for the Pickett Estate just as effectually as if he made a tender of so much money. He had but to produce his paid cheques or receipted bills, and the allowance of the corresponding items in the account was inevitable. It is impossible to see why the Newell Estate should, by reason of what in fact occurred, be in any better position or the Pickett Estate in any worse position than it would have been in, had Berry retained the money itself and had paid that over at the time of his accounting.

It remains for us to examine some of the other points made in the course of the opinion, and to show that they are either specious only or beside the mark. The first of these can hardly be called even specious. To say as the court did that the account was a lying account and that the defendants were not bound by it,[15] or "It cannot be that in equity the defendants are to have both their claim against Berry . . . and the payment of their debts . . .,"[16] does not help to answer the question whether what occurred at the time of the accounting gave the defendants a right in equity to keep what they had got. These observations of the court simply beg that question. If the defendants, through Berry's wrongful use of the plaintiffs' money, got no benefit which they could retain, then of course Berry should not have been allowed for the payment of the bills. On the other hand, if the defendants did have a right to retain the benefit because they became purchasers for value at the time of the accounting, then the account was not a lying account, and they had no claim against Berry for the money he had stolen from them but had accounted for by showing that he had paid the bills in question. The reasoning of the court would make it impossible ever to treat a man like a purchaser for value in respect of property taken in payment of a preëxisting debt.

[15] 206 Mass. 350, 92 N. E. 514.
[16] 206 Mass. 351, 92 N. E. 514.

In this connection attention may be called to the fact that if Berry's obligation to the Pickett Estate was discharged, the benefit which the Pickett Estate received through the payment of its bills was offset by the loss, to an equal amount, of its claim against Berry. In other words, Berry had used the plaintiffs' money not only to pay the bills, but also to obtain his own discharge, so that the trust estate was not benefited but was only made whole. It is a curious circumstance that if the defendants' equity to retain the benefit as purchasers for value was a good equity, it not only defeated but utterly destroyed the plaintiffs' equity, because the plaintiffs could no longer say that the Pickett Estate had been unjustly enriched by the use which Berry had made of their money.

It makes no difference, so far as the right of the defendants to be regarded as purchasers for value was concerned, whether the benefit enured to the Pickett Estate, to the trustees, or to the *cestuis*. In the probate accounting the innocent trustee of the Pickett Estate represented the estate. The *cestuis* represented themselves. Each and all had a right to make Berry account, and consented to his discharge in the belief that he had paid the bills with money which he ought to have used for the purpose.

In all the reasoning of the court in respect to the effect of the accounting the trouble is due to the fact that the court confused what the defendants actually received with the money which Berry used to pay the debts. It was this confusion of ideas that led the court to say that the plaintiffs' rights were fixed when Berry paid the defendants' debts with the plaintiffs' money. But suppose again that Berry's duty to the defendants had been to buy them bonds, and that he had bought the bonds with the plaintiffs' money, but suppose for our present purpose that he had held the bonds till the time of the accounting when he had turned them over to the *cestuis*. No one would venture to say that the plaintiffs' rights were fixed when Berry used the money for the defendants' benefit, that the bonds belonged to the plaintiffs in equity because Berry had bought them with the plaintiffs' money, and that the subsequent delivery to the defendants did not make them purchasers for value. If the actual receipt of the thing in question with knowledge and an intention to discharge the debtor is the essence of the equity, then the defendants' equity remained in abeyance, as it were, from the time when the bills were paid until Berry settled

his account. The knowledge which they then received and the discharge of Berry perfected the equity.

It would serve no purpose to follow the opinion through all the discussion which it contains, based on the theory that when Berry paid the money to the creditors he somehow or other paid it to himself as the defendants' trustee. The case of the Atlantic Bank *v.* Merchants' Bank, for example, discussed by the court,[17] had no application to the case at bar except on this impossible theory as to what the defendants had actually got and claimed a right to hold.

We wish, however, to say something about Bannatyne *v.* MacIver,[18] cited by the court to the point that the state of the accounts between Berry and his trust could have no effect to raise an equity on the defendants' side strong enough to overcome the plaintiffs' equity. Our court failed to perceive that the plaintiffs in the English case not only had the equity resting on the fact that their money had been used to pay the defendants' bills, but also had the equity resting on an equitable estoppel which made it unjust for the defendants to deny the agent's authority to the extent to which as their agent he had actually used the money for their benefit. Hudson, the agent in the English case, had not attempted to discharge any duty that he personally owed to the defendants by borrowing the money and using it to pay the defendants' bills. If he bought for them a benefit by the payment of the bills he tried to impose on them a corresponding burden by borrowing the money in their names. He undertook to borrow the money and to use it simply as their agent. If in Bannatyne *v.* MacIver it had appeared that the defendants had become aware of Hudson's improper withdrawals, and in consequence had demanded that he pay the bills from his own resources, and he had then stolen the plaintiffs' money, paid the bills, sent the receipts to the defendants, and settled his accounts with the defendants, the case would have been like Newell *v.* Hadley, but it would have been a widely different case from that with which the English court actually had to deal.

How wide the difference between Bannatyne *v.* MacIver and

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[17] 10 Gray (Mass.) 532 (1858). The discussion is in 206 Mass. 350–351, 92 N. E. 513, 514.

[18] [1906] 1 K. B. 103, *supra*, p. 607. See the discussion of this case in 206 Mass. 352, 92 N. E. 514.

Newell *v.* Hadley is, can be shown by supposing a case which lies midway between the two. Suppose that Hudson in response to a demand that he make good his overdrafts had gone out and fraudulently borrowed money in the defendants' names, had paid their bills with it and had thus obtained credit in an accounting with them. Here the equitable estoppel might possibly have been invoked. On the other hand, it could have been argued that when Hudson used the borrowed money to pay the bills he used it not only to buy a benefit for the defendants, but also used it to discharge his own personal obligation to them. In this case the defendants' right to be regarded as purchasers for value would have overcome the plaintiffs' equity. For if Hudson to make good his shortage had fraudulently borrowed money in the defendants' names and paid it over to his principals, they would have been purchasers for value of the money. And if of the borrowed money itself, then why not of the benefit which he bought for them with the borrowed money and for which he got credit?

Disregarding any possible equity on the defendants' side other than those considered by the court, we think that we have shown that the decision was as wrong as wrong could be. In the first place, the court failed to understand the nature of the plaintiffs' equity and the extent to which the cases relied on were really applicable. In the next place, the court wholly misconceived what it was that the defendants had got and in respect to which they might be treated as purchasers for value. And, finally, the court failed to perceive on what the equity of a so-called purchaser for value, who has taken property for a preëxisting debt, really rests.

R. D. Weston.

BOSTON, MASS.